



DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PLAN Fiscal Year 2004

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Office of Minority Affairs*

Revised 06/21/04



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FORMS:

The forms used in relation to the DBE Program are subject to modification from time to time. Please check the Kentucky Transportation Cabinet website at <http://www.transportation.ky.gov> for current information impacting the DBE Program or call the phone number(s) indicated.

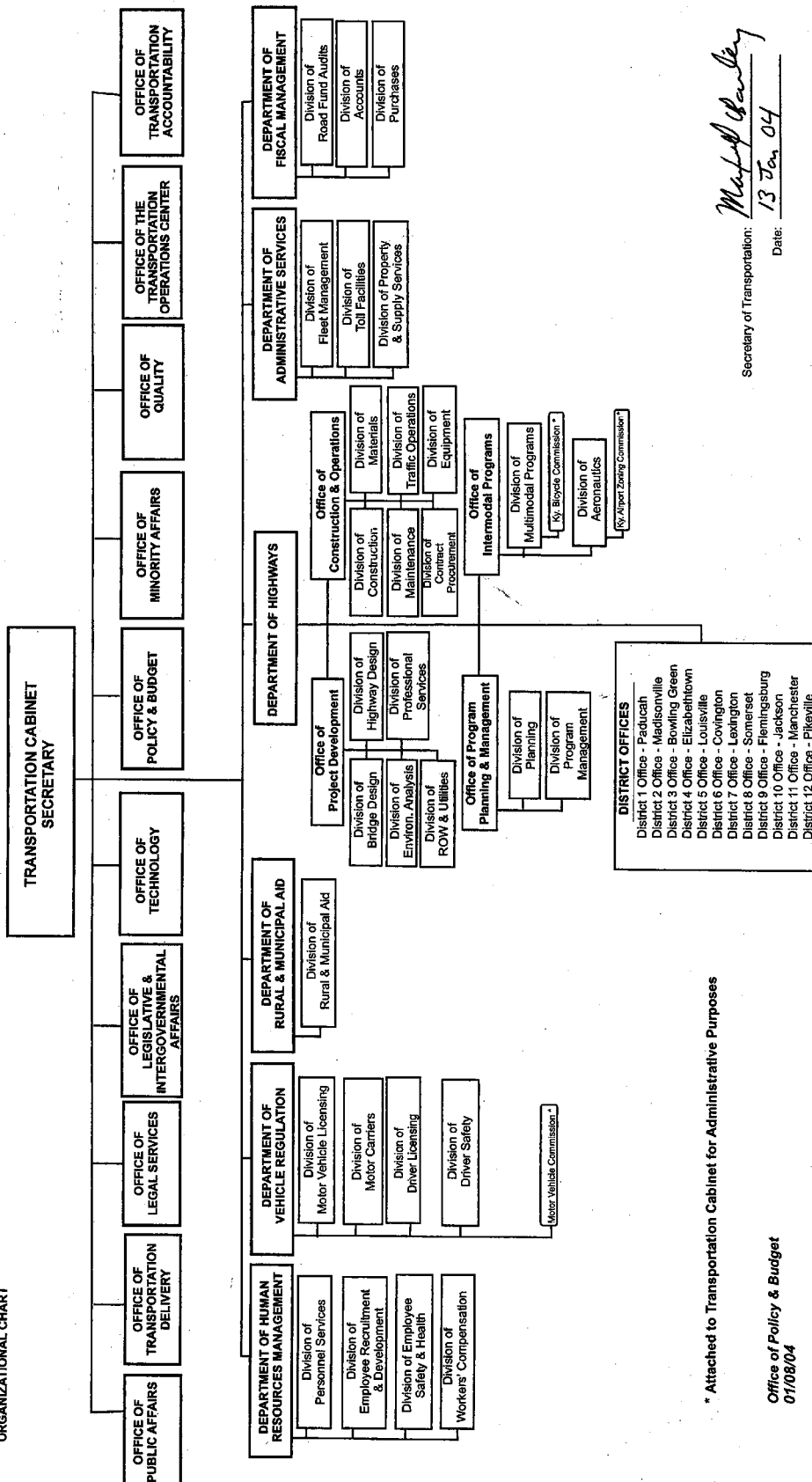
Available through the Office of Minority Affairs at 502/564-3601:

DBE Certified and Prequalified Directory
DBE Program Plan
Unified Certification Program (UCP) Application Packet

Available through the Division of Contract Procurement at 502/564-3500:

Certificate for Eligibility or Renewal Prequalification Packet
DBE Detail Participation Plan
General DBE Participation Plan
Prequalified Contractors List

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
ORGANIZATIONAL CHART



* Attached to Transportation Cabinet for Administrative Purposes

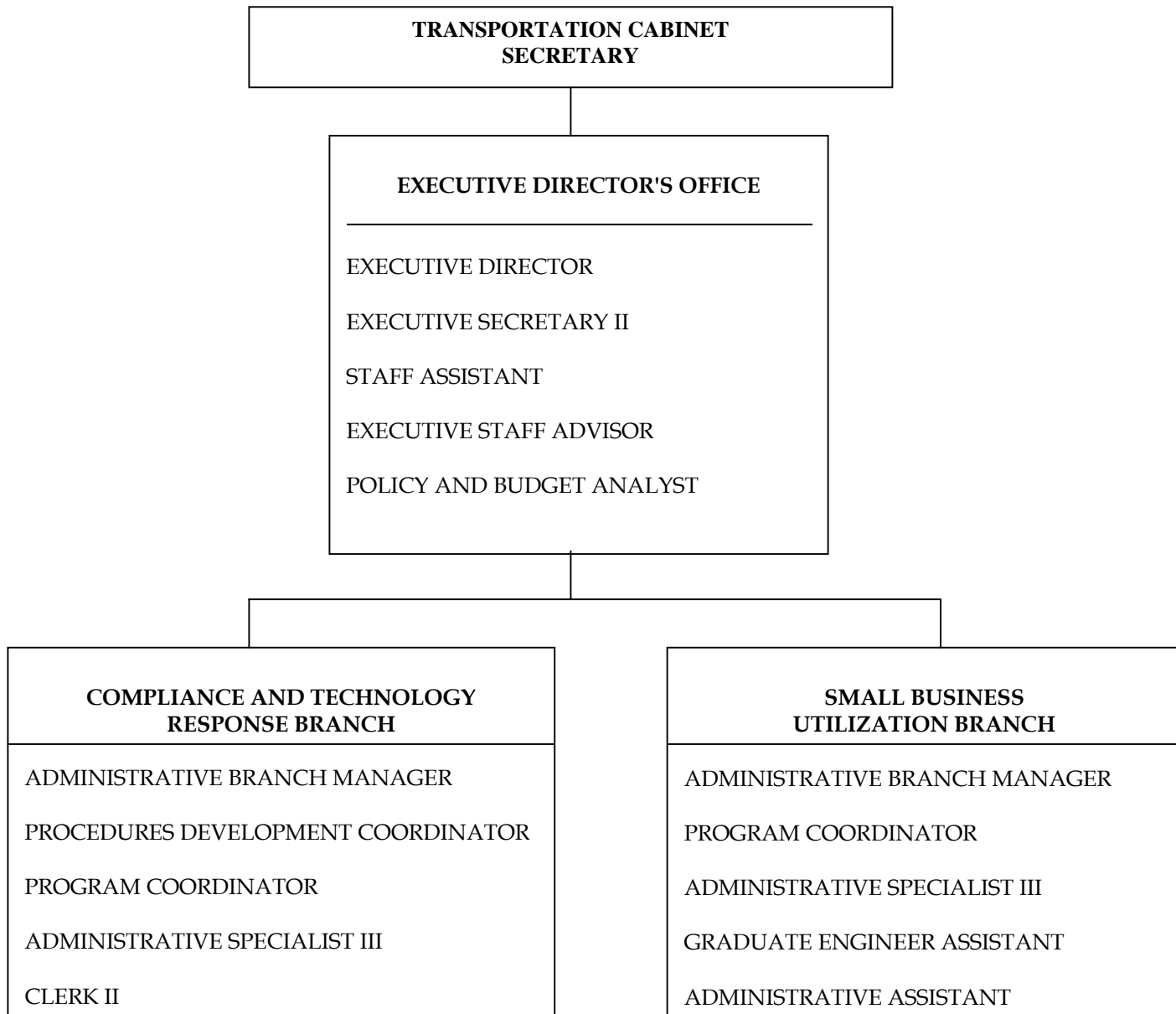
Office of Policy & Budget
01/08/04

Secretary of Transportation:

Date:

Mark Chandler
13 Jan 04

OFFICE OF MINORITY AFFAIRS ORGANIZATIONAL CHART



I. INTRODUCTION

The Kentucky Transportation Cabinet ("Transportation Cabinet") in accordance with requirements of 49 Code of Federal Regulations Part 26 ("49 CFR 26") has developed the Kentucky Disadvantaged Business Enterprise Program ("DBE Program") for the purpose of leveling the playing field for DBEs with respect to projects funded in whole or part by the U. S. Department of Transportation ("U.S.D.O.T." or "DOT"). The provisions of the Transportation Cabinet's DBE Program shall apply to all recipients and subrecipients, including contractors and subcontractors, of Federal highway funding under Titles I (other than Part B) and V of the Inter-modal Surface Transportation Efficiency Act ("ISTEA") of 1991; Titles I, III and V of the Transportation Equity Act for the 21st Century ("TEA-21"); Federal transit funds authorized by Titles I, III and V of TEA-21 and airport funds authorized by 49 U.S.C. 47101, *et. seq.*

The Transportation Cabinet has conducted a DBE Program since 1982. The program has functioned as an integral component of its federal highway construction program by providing the impetus for increasing the participation of minorities and women in contracting opportunities funded by U.S.D.O.T. This program extends the commitment of the Transportation Cabinet to provide equal opportunity to all contractors, subcontractors, consultants and sub-consultants qualified to perform on U.S.D.O.T.-assisted contracts.

This program document supercedes any previously issued policy or procedural statements that may conflict with its content. In the event that any language within this program document conflicts with the regulations found at 49 CFR 26, the regulations shall have primary authority.



KENTUCKY TRANSPORTATION CABINET
FRANKFORT, KENTUCKY 40622
WWW.KENTUCKY.GOV

ERNIE FLETCHER
GOVERNOR

MAXWELL C. BAILEY
SECRETARY

**DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM
POLICY STATEMENT**

The Kentucky Transportation Cabinet ("Cabinet") agrees to a policy of nondiscrimination in the award and administration of United States Department of Transportation ("USDOT")-assisted contracts in its Federal highway, transit and airport financial assistance program.

The Cabinet has established a narrowly tailored disadvantaged business enterprise ("DBE") program, in accordance with applicable law, for the purpose of (a) creating a level playing field on which DBEs can compete fairly for USDOT-assisted contracts; (b) ensuring that only firms that fully meet the eligibility standards are permitted to participate as DBEs; (c) helping to remove barriers to the participation of DBEs in USDOT-assisted contracts; (d) assisting the development of firms that can compete successfully in the marketplace outside the DBE program, and (e) providing appropriate flexibility to subrecipients and contractors in establishing and providing opportunities for DBEs.

Furthermore, the Cabinet, its subrecipients, contractors and subcontractors shall not discriminate on the basis of race, color, national origin or sex in the award and performance of USDOT-assisted contracts or in the administration of its DBE program or the requirements of 49 CFR Part 26.

The Cabinet shall take all necessary and reasonable steps under 49 CFR Part 26 to implement this policy with its subrecipients, contractors and subcontractors.

This policy statement shall be circulated throughout the Cabinet and to the DBE and non-DBE business communities that perform work on the Cabinet's USDOT-assisted contracts.

Signed and approved this 28 day of April, 2004.

APPROVED AS TO FORM
AND LEGALITY

Frank Miller, Jr., Executive Director
Office of Legal Services

Maxwell C. Bailey, Secretary
Kentucky Transportation Cabinet

I have read this policy statement and understand the provisions
contained within and acknowledge the receipt of this policy.

Signature

Date

Social Security Number

An Equal Opportunity Employer M/F/D

III. DEFINITIONS

NOTE: Additional definitions applicable to the DBE Program may be found in 49 CFR 26.5 (<http://www.fhwa.dot.gov/hep/49cfr26.htm#sec.26.5>) and 600 KAR. 4:010 (<http://www.lrc.state.ky.us/kar/600/004/010reg.htm>)

Affiliation has the same meaning the term has in the Small Business Administration (“SBA”) regulations, 13 CFR Part 121.

- (a) Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either or directly or indirectly:
 - (i) One concern controls or has the power to control the other; or
 - (ii) A third party or parties controls or has the power to control both; or
 - (iii) An identity of interest between or among parties exists such that affiliation may be found.
- (b) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE Program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaskan Native if their father or mother is regarded as an Alaskan Native.

Alaska Native Corporation (“ANC”) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et. seq).

Applicant or **Firm** means any corporation, partnership, sole proprietorship, applying with the Transportation Cabinet for certification and renewal as a disadvantaged [minority or women] business enterprise.

Approval means that the applicant meets disadvantaged, minority or women business enterprise eligibility criteria as outlined in 49 CFR 26 and as required by this administrative regulation.

Cabinet means the Kentucky Transportation Cabinet.

Certification means the process whereby the Transportation Cabinet determines whether an applicant meets the criteria set for in 49 CFR 26 for eligibility as a socially and economically disadvantaged business enterprise. The criteria for DBE certification may be found at 49 CFR 26, Subpart D.

Challenge means an action in which a third party questions the socially and economically disadvantaged status of certified disadvantaged business enterprise program participant or applicant for DBE certification.

A DBE performs a “**Commercially useful function**” when it is responsible for the execution of the work of a contract and is carrying out its responsibility by actually performing, managing, and supervising the work involved. With respect to furnishing materials and supplies as part of the DBE contract, the DBE performs a "commercially useful function" when the DBE is responsible for negotiating price, determining quality and quantity, ordering materials, and installing (where applicable) and paying for the material itself. A DBE does not perform a "commercially useful function" if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. See also 49 CFR 26.55.

Compliance means that a recipient has correctly implemented the requirements of 49 CFR 26.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

Contractor means one who participates, through a contract or subcontract (at any tier), in a U.S.D.O.T.-assisted highway, transit or airport program.

Department or ("DOT") means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration ("FHWA"), the Federal Transit Administration ("FTA") and the Federal Aviation Administration ("FAA").

Disadvantaged Business Enterprise or ("DBE") means for a profit small business concern:

- (a) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- (b) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Good Faith Efforts means efforts to achieve a DBE goal or other requirement of 49 CFR 26 which, by their scope, intensity and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Immediate Family Member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law or father-in-law.

Indian Tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group or community resides. See definition of "Tribally-owned Concern" in this section.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of 49 CFR 26.

Operating Administration or ("OA") means any of the following parts of U.S.D.O.T.: The Federal Aviation Administration ("FAA"), Federal Highway Administration ("FHWA") and Federal Transit Administration ("FTA"). The "Administrator" of an operating administration includes his or her designees.

Personal Net Worth ("PNW") means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm: or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Prequalified or Prequalification refers to the process or receipt of a certificate of eligibility issued by the Transportation Cabinet. Firms doing business with the Transportation Cabinet must be prequalified and issued a certificate of eligibility to contract with the Transportation Cabinet in accordance with KRS 176.140 and the regulations found at 603 KAR 2:015 (highway construction) and 600 KAR 6:040 (professional services).

Primary Industry Classification means the four-digit Standard Industrial Classification (SIC) code designation, which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual and the NAICS Manual are deemed to refer to the NAICS Manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U. S. Department of Commerce (Springfield, VA, 22261).

Primary Recipient means a recipient that receives U.S.D.O.T. financial assistance and passes some or all of it on to another recipient.

Principal Place of Business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management are directed and where business records are kept in different locations, the recipient will determine the principal place of business for DBE Program purposes.

Program means any undertaking on a recipient's part to use U.S.D.O.T. financial assistance, authorized by the laws to 49 CFR 26.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of 49 CFR 26, **race-neutral** includes gender-neutrality.

Recipient is any entity, public or private, to which U.S.D.O.T. financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Regular dealer means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which materials required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a *regular dealer*, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A regular dealer may not act exclusively as a supplier for contractors on Federal-aid highway construction projects. In order to qualify as a *regular dealer* in bulk items, such as rock and asphalt, a company is not required to store the materials on the business site, but instead, the business can qualify as a regular dealer if it both owns and operates distribution equipment for the products.

Secretary means as appropriate either the Secretary of Transportation of U.S.D.O.T., the Kentucky Transportation Cabinet or their designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small business concern means, with respect to firms seeking to participate as DBEs in U.S.D.O.T.-assisted contracts, a small business concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration ("SBA") regulations implementing it, 13 CFR Part 121, that also does not exceed the cap on average annual gross receipts specified in 49 CFR 26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is (1) found by a recipient to be socially and economically disadvantaged on a case-by-case basis; or (2) an individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

- (a) "Black Americans" which includes persons having origins in any of the Black racial groups of Africa;
- (b) "Hispanic Americans" which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- (c) "Native Americans" which includes persons who are American Indians, Eskimos, Aleuts or Native Hawaiians;
- (d) "Asian-Pacific Americans" which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myam-nar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, federated states of Micronesia or Hong Kong;
- (e) "Subcontinent Asian Americans" which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- (f) Women;
- (g) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Subcontractor means an individual firm, or corporation who, with the written consent of the Department, subcontracts any part of the contract. First tier, subcontractors are those to whom contractor subcontracts a portion of the work. Second tier subcontractors are to whom a first tier subcontractor subcontracts a portion of the work.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

U.S.D.O.T-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

IV. ASSURANCES

Each financial assistance agreement the Transportation Cabinet signs with a U.S.D.O.T. operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any U.S.D.O.T.-assisted contract or in the administration of its DBE Program or the requirement of 49 CFR 26. The recipient shall take all necessary and reasonable steps under 49 CFR 26 to ensure nondiscrimination in the award and administration of U.S.D.O.T.-assisted contracts. The recipient's DBE Program, as required by 49 CFR 26 and as approved by U.S.D.O.T, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the U.S.D.O.T may impose sanctions as provided for under 49 CFR 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et. seq.*)

Each contract the Transportation Cabinet signs with a contractor (and each subcontractor signs with a subcontractor) must include the following assurance:

The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR 26 in the award and administration of U.S.D.O.T.-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

V. ADMINISTRATION

DBE Liaison Officer

The Executive Director of the Office of Minority Affairs (“OMA”) shall make a recommendation to the Secretary of the Transportation Cabinet who will appoint a DBE Liaison Officer (“DBELO”). The DBELO is responsible for implementing all aspects of the Transportation Cabinet’s DBE Program and ensuring that the Transportation Cabinet complies with all provisions of 49 CFR 26. The DBELO has direct and independent access to the Secretary of the Transportation Cabinet concerning DBE Program matters.

The DBELO can be reached at 502/564-3601 in the OMA of the Kentucky Transportation Cabinet located at 200 Mero Street, Sixth Floor 6-6, Frankfort, Kentucky 40622.

The duties of the DBELO include, but are not limited to:

- Communication with the Federal Highway Administration concerning the operation of the Transportation Cabinet’s DBE Program;
- Keeping the Secretary of the Transportation Cabinet informed concerning the workings and status of the DBE Program;
- Compilation of reports required by Federal Highway Administration;
- Communication with DBEs and non-DBEs concerning the requirements of the DBE Program;
- Management of the compilation of information required for the certification of DBEs;
- Preliminary investigation of complaints about the performance and activities of DBEs, and
- Coordinates the Unified Certification Program (UCP)¹

An organizational chart displaying the position of the DBELO within the Transportation Cabinet is provided on page 6 in this Program Plan.

¹ The UCP Application is available through the OMA.

Responsibilities of the Office of Minority Affairs (OMA)

The OMA is dedicated to the promotion and protection of the civil rights of employees and applicants for employment within the Transportation Cabinet, along with ensuring that disadvantaged businesses have the maximum opportunity to participate in the DBE Program, as mandated by 49 CFR 26.

The OMA has the following responsibilities regarding the DBE Program:

1. **DBE Certification**

The OMA is primarily responsible for the processing of DBE certification applications. The OMA conducts on-site reviews of DBE firms and compiles a factual report of the information collected concerning applicants for DBE certification for presentation to the DBE Certification Committee. Applications for DBE certification are processed through OMA. The OMA may receive assistance in processing applications from the Division of Contract Procurement and the Division of Construction.

2. **Records Retention**

The OMA shall retain all records generated by or provided to the Transportation Cabinet that are related to a certified DBE firm for at least 3 years from the date of notice of certification.

3. **Supportive Services**

The OMA provides supportive services to DBEs and potential DBEs free of charge. These services range from group seminars covering practical issues related to the highway construction business to individual counseling. The intent of OMA's supportive services efforts is to assist DBEs in developing the technical and business management skills necessary to succeed in the transportation industry.

For information concerning available assistance and schedules of upcoming activities, check the OMA website at <http://transportation.ky.gov/OMA/> or phone OMA at 502/564-3601.

4. **Reporting Requirements**

The OMA is responsible for the compilation of information and preparation of reports required to be submitted to the U.S.D.O.T. in accordance with 49 CFR 26.

Financial Institutions

The Transportation Cabinet will continue to annually survey the financial institutions within the state to identify those institutions that are owned and controlled by minorities and women. For those institutions identified as minority or women-owned, the Transportation Cabinet will investigate the services provided, make all reasonable efforts to utilize services offered and encourage prime and subcontractor to use those services whenever possible.

Program Development

The Transportation Cabinet will implement all of the provisions of 49 CFR 26 and of this DBE Program Plan consistent with U.S.D.O.T. requirements. All significant program changes will be submitted to the operating administration affected and the Federal Highway Administration for approval.

DBE Directory

The Transportation Cabinet shall maintain and make available to all interested parties a current directory of certified DBE firms eligible to participate in the DBE Program. The DBE directory shall be updated monthly, published on the Transportation Cabinet's website <http://transportation.ky.gov/OMA/Directories.htm> and will identify eligible DBE certified and prequalified firms by type, address, telephone number and work performed.

In addition to a directory of all DBEs certified by the Transportation Cabinet, a second directory will be compiled listing only those DBEs who are prequalified by the Transportation Cabinet to participate in highway design and construction projects. This directory shall include certified material suppliers, trucking and related service providers eligible to participate in the DBE program.

Bidders List

The Transportation Cabinet shall create and maintain a bidders list. The list shall consist of all firms prequalified who do business with the Transportation Cabinet. Prequalified contractors include all prime and subcontractors that have expressed they are ready, willing, and able to do business with the Transportation Cabinet in accordance with state laws. On December 1st of each year (beginning in 2003) the Transportation Cabinet will compile its bidder list providing the following information:

- (a) Firm's name;
- (b) Firm's address;
- (c) DBE status;

- (d) Age of firm, and
- (e) Annual gross receipts.

In addition, the Transportation Cabinet shall collect information from successful prime contractors pertaining to which DBEs are bidding on jobs. Prime contractors shall be required to list on the General DBE Participation Plan, the names of all DBEs who submitted bids for each contract on which they are successful. In addition, the Transportation Cabinet shall conduct an annual survey of certified DBEs concerning the number and the type of Transportation Cabinet contract(s) on which they have submitted written bids for the preceeding construction season.

The OMA, Small Business Utilization Branch, in coordination with the Division of Contract Procurement and the Division of Construction will maintain and update the list by reviewing the records of the Prequalification Section of the Division of Contract Procurement. All the above data is on file with the Division of Contract Procurement and OMA and any contractor (prime or sub) failing to provide any of the required data shall not be allowed to work on any contracts with the Transportation Cabinet.

VI. PROGRAM GOAL

The national goal for the DBE Program is not less than 10 percent of federal transportation funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21).²

The goal does not apply to projects paid for exclusively with state funds.

The national 10 percent goal is an aspirational goal. The Transportation Cabinet must set an overall goal for its DBE Program. The federal government does not dictate the amount of the goal.³ The DBE Program does not set quotas for DBE participation, nor is it a set-aside program.⁴

The Transportation Cabinet has established an overall DBE goal for fiscal year 2004 (October 1, 2003 through September 30, 2004) as 7.00 percent. This goal is consistent with the requirements of 49 CFR 26.45.

The Transportation Cabinet expects to meet the 7.00 percent overall goal in obtaining 2.00 percent from race neutral means and 5.00 percent participation through race conscious means. Contract goals will be established on U.S.D.O.T.-assisted contracts only.

The Transportation Cabinet may not set aside entire federally-funded projects, or use projects financed solely by state funds to meet its overall DBE goal.⁵

Procedures for Setting the Annual Overall Goal

The Transportation Cabinet derives the overall DBE Program goal consistent with the requirements of 49 CFR 26.45(c).

The Transportation Cabinet uses the U.S.D.O.T. recommended three-step procedure to develop its base goal. The U.S.D.O.T. procedure guides state recipients through the process of setting fair and equitable DBE goals in accordance with intent of 49 CFR 26 and also allows for the individual states to make adjustments for an individual state's situation. This guide is published on the U.S.D.O.T.'s web page, titled *Tips For Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*, <http://osdbuweb.dot.gov/business/dbe/tips.html>

² 49 CFR 26.41.

³ 49 CFR 26.41(c).

⁴ 49 CFR 26.43(a).

⁵ 49 CFR 26.43(b).

To assist recipients in determining a fair and equitable DBE goal, the U.S.D.O.T. has published a guide, *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*, to assist state DOT's in determining their DBE goals. This guide is straightforward and consistent with the intent of 49 CFR 26. The first of the three-step process establishes a baseline that considers the degree of representation of DBE firms in the state's competitive highway construction environment. The second step allows for adjustment of this baseline to accommodate situational differences that may occur from state to state, from year to year. The third step establishes race/gender-neutral and race/gender-conscious categories to give an indication on how the overall goal is best to be implemented and accomplished. These three goal-setting steps are discussed in further detail below.

1. Step-One (Base Figure):

Step One determines the percentage of DBE firms participating in federally-funded highway contracts. This percentage is calculated by dividing the number of DBE firms by the number of all firms that are deemed as ready, willing, and able to perform work on federally-funded jobs. In order to determine this percentage for the Commonwealth of Kentucky, three sources of information was used.

The first source of information, "*Certified and Prequalified Disadvantaged Business Directory*" is the current Transportation Cabinet list of DBE firms that are currently participating in the DBE Program in the highway construction firm category. This list is available through the OMA's website, http://transportation.ky.gov/OMA/PREQUALDBE_Directory.pdf

The second source, "*Prequalified Consultant List*" identifies DBE and non-DBE professional services firms that currently participate in federally-funded/assisted professional services contracts. This list is available through the Division of Professional Services' website, http://www.kytc.state.ky.us/proserv/Prequal/Address_1.html The third source of information, "*Prequalified Contractor Listing*" identifies the total number of DBE and non-DBE firms participating in the overall highway construction program in Kentucky. This list may be found on the Division of Contract Procurement's website,

<http://transportation.ky.gov/Contract/Pqbook.pdf>

Step-One Base Figure = Number of DBE's ready, willing, and able
Number of all firms ready, willing, and able (DBEs and non-DBEs)

In the above equation, the "base figure" computation was limited to firms participating on the federally-funded highway projects only. The contract amount dollars are not equally represented in each of the categories identified above, being mostly concentrated in the construction contract awards, and not represented at all in the Right-of-Way/Utilities categories.

To ensure that the base figure represents actual spending, weighting factors by percent of total annual spending are used for each category. Annual spending volumes were obtained from the appropriate Transportation Cabinet officials in each category.

2. Step-Two (Adjustment):

Step Two focuses on considerations given to conditions that would suggest adjusting the step one weight base figure. The Transportation Cabinet has found that not all of the possible adjustments outlined in U.S.D.O.T.'s guide are appropriate for its circumstances.

In past investigations of contractor work records, several clarifications of information contained in the 1405 reports were made that did impact the setting the overall DBE goal. The Transportation Cabinet report 99-54 "Procedures for Determining a Working Capacity for Disadvantaged Business Enterprises (DBE) for Highway Construction and Consulting Projects in Kentucky", and Kentucky Transportation Center report 10-15 "Evaluation of Working Capacity for Disadvantaged Business Enterprises (DBE) for Highway Construction in Kentucky, FY 2001 Update" document such adjustments.

The U.S.D.O.T. guide does suggest adjustment of the Step One weighted Base Figure to accommodate the actual DBE firms' historical working capacity. The method suggested averages the Step One weighted Base Figure with the median of the historical working capacity expressed as a percentage.

$$\text{Adjusted DBE Goal} = \frac{\text{Weighted base figure} - \text{Median of the historical DBE working capacity}}{2}$$

3. Step-Three (Race/Gender-Neutral and Race/Gender-Conscious):

Step-Three procedures set race/gender-neutral and race/gender-conscious categories. 49 CFR 26 stipulates that the state's DBE overall goal be satisfied first by race/gender-neutral participation and if not sufficient, then by race/gender-conscious participation. The U.S.D.O.T. guide specifies the race/gender-conscious goal to be the Adjusted DBE Goal from Step-Two minus the historical median of the race/gender-neutral participation percentage.

$$\text{Adjusted DBE Goal} = \text{Race/gender-neutral} + \text{Race/gender-conscious participation}$$

$$\text{Race/gender-conscious participation} = \text{Adjusted DBE Goal} - \text{Race/gender-neutral}$$

The Transportation Cabinet also requires that recipients of Transportation Enhancement (TE) funds involve DBEs in their projects. The OMA shall provide technical assistance to TE recipients in the initiation and development of their DBE programs. Participation by DBEs in enhancement projects will be counted toward the race neutral portion of the Transportation Cabinet's DBE goal.

An OMA staff member is assigned to the Transportation Cabinet's Division of Multimodal Programs on a day-to-day basis to:

- assist the Director with monitoring Federal-aid Transportation Enhancement Program funds for DBE compliance;
- provide technical assistance to local government project sponsors to ensure that DBE provisions are included in accordance with contract criteria; and
- ensure all local government awarded prime contractual amounts, DBE awards and commitments are captured, recorded in the DBE Tracker and included in the Federal Highway Administration Quarterly 1405 report for OMA.

Race Neutral and Race Conscious Participation

Consistent with the requirements of Section 26.51 (b) the Transportation Cabinet will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. The Transportation Cabinet uses the following race-neutral means to increase DBE participation: conducting the annual Entrepreneurial Development Institute; conducting small business development workshops and seminars; on site management and technical assistance and counseling services to small and disadvantaged contractors and related services firms.

Utilization of TEA-21 contracts to encourage small municipalities to involve DBEs in local projects; and

The Transportation Cabinet shall meet the maximum feasible portion of its overall goal through race-neutral measures of facilitating DBE participation. The Transportation Cabinet will encourage prime contractors to use certified (and prequalified) DBE firms and other small businesses on U.S.D.O.T.-assisted contracts. Additionally, the Transportation Cabinet shall provide supportive services to DBE firms:

- a. to improve and develop their immediate and long-term business management, record keeping and financial and accounting capabilities;

- b. to increase their opportunities to participate in a variety of kinds of work and achieve self sufficiency;
- c. to increase their ability to handle increasingly significant projects; and
- d. to assist DBEs and other small businesses in business start up and development and utilizing emerging technology. The Transportation Cabinet shall monitor the race-neutral goal attainment quarterly and adjust the use of contract/project goals as needed.

The Transportation Cabinet shall use contract goals to meet a percentage of its overall DBE Program. Contract (or race-conscious) goals shall be set only on U.S.D.O.T.-assisted contracts containing subcontracting possibilities. The Transportation Cabinet shall consider the following factors in determining a goal for an eligible project:

- the type of work involved;
- the location of the project; and
- the availability of DBE firms for the work of a project.

Prior to each letting, proposed contract goals shall be sought from the office of the State Highway Engineer, the OMA, the Kentucky Highway Contractors Association, the Kentucky Association of Disadvantaged Business Enterprises, and, on professional services contracts, the Division of Professional Services. These proposed goals shall be considered by the Secretary of the Transportation Cabinet in the final determination of the goal set for individual projects.

The Transportation Cabinet shall use contract goals so that the goals cumulatively result in meeting the overall DBE goal. The Transportation Cabinet does not project being able to meet its overall goal solely through race-neutral means.

The Transportation Cabinet will express its contract/project goals as a percentage of the total amount of U.S.D.O.T.-assisted funds.

Contract goals established by the Transportation Cabinet shall be published in the Transportation Cabinet's website; Notice to Contractors and bid proposals issued for each U.S.D.O.T.-assisted project.

VII. CERTIFICATION STANDARDS

Burden of Proof

Certification is required to participate in the DBE Program. The DBE certification process is separate and distinct from the prequalification process.

Firms applying for DBE Program certification have the burden of demonstrating to the Transportation Cabinet, by a preponderance of evidence, that they meet the group membership, disadvantaged, business size, ownership and control requirements of 49 CFR 26, Subpart D and Appendix E.⁶

Firms owned and controlled by individuals identified to be socially and economically disadvantaged are presumed to be eligible to participate in the Kentucky DBE Program. As a result, these individuals are not required to bear the burden of proving their eligibility. However, the eligibility presumption is rebutted based upon the individual owner(s) ability to meet the personal net worth threshold of \$750,000.00.

Firms owned by individuals who are not presumed to be socially and economically disadvantaged, and firms owned by individuals about whom the presumption has been rebutted, have the burden of proving, by a preponderance of evidence, that they meet the requirements of 49 CFR 26, Appendix E.

Group Membership Determinations

Firms owned and controlled by individuals about whom a question arises concerning his or her membership in a presumptively eligible group, must prove by a preponderance of evidence, that its owner(s) are members of the group.

If the Transportation Cabinet has a reasonable basis for doubting the validity of the asserted group membership of an applicant, then it is appropriate for the OMA to collect additional information. In such a case, the OMA must inform the applicant, in writing, of the reasons for seeking additional documentary evidence.⁷

In making such determinations, the Transportation Cabinet shall consider whether the individual has held him/her out to be a member of the group over a long period of time prior to applying for certification, and whether the individual is regarded as a member of the group by the relevant community. The firm must submit appropriate documentation of group membership.

⁶ 49 CFR 26.61.

⁷ 68 Fed. Reg. 3550 (June 16, 2003).

Firms applying for DBE Program certification whose claim to membership in a presumptively eligible group has been rejected by the Transportation Cabinet may demonstrate, on an individual basis, that they are socially and economically disadvantaged pursuant to 49 CFR 26, Appendix E.

Group membership determinations made by Transportation Cabinet may be appealed under provisions of the Kentucky Revised Statutes ("KRS") Chapter 13B. Decisions made under 13B if appealed must be appealed to the U.S.D.O.T.

Social and Economic Disadvantaged Determinations

Determinations of social and economic disadvantage are made by the Transportation Cabinet in accordance with 49 CFR 26.67.

1. Affidavit Social and Economic Disadvantage

All applicants for DBE certification shall submit a signed and notarized affidavit indicating that each presumptively eligible owner whose ownership contributes to the majority is, in fact, socially and economically disadvantaged. If the individual's personal net worth exceeds \$750,000.00, the individual's presumption of economic disadvantaged is rebutted.

2. Statement of Personal Net Worth

Each program-eligible individual owner of a firm applying for DBE certification, whose ownership and control are relied upon to qualify for program participation, and his or her spouse, must submit a signed and notarized statement of personal net worth at the time the application for certification is made.

Personal net worth determinations made by the Transportation Cabinet shall exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence. A contingent liability does not reduce an individual's net worth. For example, an applicant cannot use the risk of a judgement in a pending lawsuit to reduce his or her personal net worth.

Individual applicants are required to submit their personal income tax information to the Transportation Cabinet so that an accurate determination of applicant eligibility for participation in the DBE Program can be made.⁸

⁸ 68 Fed. Reg. 35548 (June 16, 2003).

The value of a retirement accounts will be calculated in accordance with the standard set forth in 49 CFR 26.67.⁹

Statements of personal net worth must be submitted on the Small Business Association (SBA) personal net worth form in conjunction with the UCP Application.¹⁰

3. Rebutting the Presumption of Social and Economic Disadvantage

If the Transportation Cabinet has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and economically disadvantaged, it may initiate an inquiry to determine whether the presumption should be regarded as rebutted with respect to that individual. In such a proceeding, the Transportation Cabinet shall bear the burden of proving, by a preponderance of evidence, that the individual is not socially and economically disadvantaged. The owners of the applicant firm are required to produce all relevant information required to make a determination in the matter. Failure to do so may result in rejection of the application.

When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility unless and until he or she makes an individual showing of social and economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds the limit prescribed by U.S.D.O.T., the individual is no longer eligible for participation in the DBE Program and cannot regain eligibility by making an individual showing of disadvantage.

If a firm applying for certification has a current, valid certification from or is recognized by the Small Business Administration ("SBA") under the 8(a) or Small and Disadvantaged Business ("SDB") Program (except an SDB certification based on the firm's self certification as an SDB), the Transportation Cabinet may accept the firm's 8(a) or SDB certification in lieu of conducting its own certification proceeding. The Transportation Cabinet may accept the certification of another U.S.D.O.T. recipient but is not required to do so. Out-of-state applicants must be certified in their home state.

⁹ 49 CFR 26.67 and 68 Fed. Reg. 35548 (June 16, 2003).

¹⁰ 49 CFR 26.67 and 68 Fed. Reg. 35547 (June 16, 2003).

Individual Determinations of Social and Economic Disadvantage

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantaged has been rebutted) may apply for DBE certification.

The Transportation Cabinet shall make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the Transportation Cabinet, by a preponderance of the evidence, that the individual(s) who own and control it are socially and economically disadvantaged. An individual, whose personal net worth exceeds \$750,000.00, shall not be deemed to be economically disadvantaged. In making these determinations, the Transportation Cabinet shall use the guidance found in 49 CFR 26, Appendix E. The Transportation Cabinet shall require applicants for DBE certification who are not presumed eligible to provide sufficient information and documentation to the Transportation Cabinet to permit determinations under the guidance of Appendix E.

Business Size Determinations

To be an eligible DBE, a firm (including its affiliates) shall be an existing small business, as defined by the SBA standards. The Transportation Cabinet shall apply the current SBA business size standards found in 13 CFR 121 appropriate to the type of work the firm seeks to perform on U.S.D.O.T.-assisted contracts.

Even if the firm meets the requirements of 49 CFR 26, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (13 CFR Part 121.402), over the firm's three (3) previous fiscal years, in excess of \$17.5 million. The U.S.D.O.T. adjusts this amount for inflation from time to time.

Ownership Determinations

Determinations of ownership for purposes of DBE eligibility are made by the Transportation Cabinet in accordance with 49 CFR 26.69. All of the facts relative to ownership must be viewed as a whole.

To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

Corporations - socially and economically disadvantaged individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

Partnerships - 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

Limited liability firms - at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

1. Ownership

The firm's ownership by socially and economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form of arrangements.

2. Contributions of Securities

All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided below:

- (a) No securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:
- (b) The beneficial owner of securities or assets held in trust is a disadvantaged individual and the trustee is the same or another such individual; or
- (c) The beneficial owner of securities or assets held in trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary and trustee.

3. Contributions of Capital

The contributions of capital by the socially and economically disadvantaged owners to acquire ownership interests must be real and substantial in accordance with 49 CFR 26.69(e).

Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual or mere participation in the firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

4. Contributions Expertise

The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

The owner's expertise must be:

- (a) In a specialized field;
- (b) Of outstanding quality;
- (c) In areas critical to the firm's operations;
- (d) Indispensable to the firm's potential success;
- (e) Specific to the type of work the firm performs; and
- (f) Documented in the records of the firms. These records must clearly show the contribution of expertise and its value to the firm.

The individual whose expertise is relied upon must have a significant financial investment in the firm.

5. Assets Gained Through Divorce, Inheritance, or Death

The Transportation Cabinet will consider all interests in a business or other assets obtained by the individual resulting from a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or through inheritance, or otherwise because of the death of the former owner, as held by a socially and economically disadvantaged individual, for purposes of determining ownership.

6. Gifts or Transfer

The Transportation Cabinet must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is:

- (a) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
- (b) Involved in the same or a similar line of business; or

- (c) Engaged in an on-going business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to the Transportation Cabinet, by clear and convincing evidence, that:

- (1) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- (2) The disadvantaged individual actually controls the management policy and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

7. Marital Assets

The Transportation Cabinet shall apply the following rules in situations in which marital assets form a basis for ownership of a firm:

- (a) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the Transportation Cabinet must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of state in which either spouse or the firm is domiciled. The Transportation Cabinet does not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm; and
- (b) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

8. Situations Warranting Additional Investigation

The Transportation Cabinet may consider the following factors in determining the ownership of a firm. However, the Transportation Cabinet cannot find a firm ineligible solely because the capitalization for the firm was obtained in one of the following ways:

- (a) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration;
- (b) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
- (c) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is such an individual. In this case, the Transportation Cabinet must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

Control Determinations

Determinations of whether a disadvantaged individual controls the firm are made in accordance with 49 CFR 26.71. In determining whether socially and economically disadvantaged owner control a firm, the Transportation Cabinet shall consider all the facts in the record, viewed as a whole.

1. Independence

Only an independent business can be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. The Transportation Cabinet may consider several factors when determining whether the applicant DBE firm is independent:

- relationships with non-facilities, equipment, financial and/or bonding support, and other resources.
- present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms compromise the independence of the potential DBE firm.
- the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
- the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

2. Restrictions on Control

The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management and policy.

A DBE firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially and economically disadvantaged owners to operate the firm. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in 49 CFR 26.69 (j)(2).

The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

- (a) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president);
- (b) In a corporation, disadvantaged owners must serve as general partners, with control over all partnership decisions; and
- (c) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

3. Involvement of Non-DBEs

Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policy making, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals.

Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated.

In order for a partnership to be controlled by social and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

4. DBE's Knowledge of the Business

The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

5. Business Licenses

If state law requires a person(s) to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged person(s) who own and control a potential DBE firm of that type must possess the required license or credential. If state law does not require such a person to have such a license or credential to own and/or control a firm, the Transportation Cabinet shall not deny certification solely on the ground that the person lacks the license or credential. The Transportation Cabinet, however, may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

6. Compensation of the DBE Owner

The Transportation Cabinet may consider differences in compensation between the socially and economically disadvantaged owners and other participants in firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning

reinvestment of income, and any other explanations for the differences proffered by the firm. The Transportation Cabinet may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, the Transportation Cabinet may consider a difference between the compensation of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

7. Outside Employment by the DBE Owner

In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

8. Participation of Family Members

A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided, the Transportation Cabinet must make a judgement about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as is done in other situations, without regard to whether or not the other persons are immediate family members.

If the Transportation Cabinet cannot determine that the socially and economically disadvantaged owners as distinct from the family as a whole-control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in firm's activities.

Where a firm was formerly owned and controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged

individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to the Transportation Cabinet, by clear and convincing evidence, that:

- (a) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- (b) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

9. Ownership of Equipment

In determining whether a firm is controlled by its socially and economically disadvantaged owners, the Transportation Cabinet may consider whether the firm owns equipment necessary to perform its work. However, the Transportation Cabinet must not determine that a firm is not controlled by socially and economically disadvantaged individual(s) solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

10. Certification for Specific Types of Work

The Transportation Cabinet shall grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate to the Transportation Cabinet only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The Transportation Cabinet may not, in this situation, require that the firm be re-certified or submit a new application for certification; but must verify the disadvantaged owner's control of the firm in the additional type of work.

11. Franchise Firms

A business operating under a franchise or license agreement may be certified if it meets the standards in 49 CFR 26 and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the Transportation Cabinet shall generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee agreement or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to

profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

In order for a partnership to be controlled by a social and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

12. Use of Leased Employees

The socially and economically disadvantaged individual(s) controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individual(s) from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

Prequalification - Certificates of Eligibility to Contract

All contractors who propose to do work with the Transportation Cabinet must obtain a Certificate of Eligibility to contract¹¹ or obtain a waiver of the requirement from the Transportation Cabinet. This requirement also applies to DBEs seeking to contract with the Transportation Cabinet, or seeking to act as subcontractors on Transportation Cabinet projects. This process is called “prequalification” and is separate and distinct from the DBE certification process.

Construction contractors must be prequalified by the Division of Contract Procurement. An application for a Certificate of Eligibility must be obtained from the Division of Contract Procurement. Engineering, design, surveying and other professional services firms must be prequalified through the Division of Professional Services. The Certificate of Eligibility is obtained independently of the DBE certification. A potential DBE may apply for a Certificate of Eligibility prior to completing the DBE certification process.

Contractors who engage in professional engineering must meet the requirements of 600 KAR 6:040. Firms that do not engage in professional engineering, but wish to provide other services to the Transportation Cabinet must meet the requirements of 603 KAR 2:015.

¹¹ Kentucky Revised Statutes 176.130.

All applicants for certificates of eligibility are required to prove that they are financially solvent and that they have access to the equipment and expertise necessary to perform the work. The applicant's experience record shall be verified and performance reports of active contractors will be reviewed. The Prequalification Section shall determine the maximum financial capacity of the applicant, as provided in the regulations.

Certificates of eligibility must be renewed within 120 days after the end of the applicant's fiscal year. The applicant must file its application for renewal within 90 days of the end of its fiscal year. The Transportation Cabinet has 30 days to process the application.¹²

Management Development Course

Firms prequalified by the Transportation Cabinet under KRS 45A.825, 600 KAR Chapter 6, or 603 KAR 2:015 to engage in highway construction, design or right-of-way activities shall attend at least one (1), one (1) week management development course every three years. Certified DBE firms not based in Kentucky may be required by the Transportation Cabinet to attend at least one (1) management development course.

Certified DBE firms, which have previously attended a management development course and which, have been cited for a violation of the governing federal regulation or Kentucky administrative regulations may be required to attend an additional management development course.

All owners of firms required to attend a management development course shall attend the course. The owners of certified DBE firms, which are not required to attend the management development course, may apply to attend. The Transportation Cabinet shall accommodate them on a space available basis.

Other Rules Affecting Certification

The Transportation Cabinet must consider other factors when making a determination of whether an applicant is DBE eligible. These factors are found at 49 CFR 26.73.

- Whether a DBE applicant can perform a "commercially useful function", as a DBE contractor cannot be considered during the certification process.¹³
- The Transportation Cabinet shall consider, in making certification decisions, whether a firm has exhibited a **pattern of conduct** indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE Program. For example, the Transportation Cabinet may consider whether the

¹² 603 KAR 2:015(6).

¹³ 49 CFR 26.73(a)(1).

DBE is performing a "commercially useful function" when there is a suspicion that the firm is acting as a pass through of funds, but is not performing work on contracts its receives for DBE credit.¹⁴

- Non-profits cannot be DBEs.¹⁵
- DBE firms must be owned by eligible individuals. Another firm, not even a DBE firm, can own them.¹⁶

The Transportation Cabinet shall evaluate the eligibility of a firm on the basis of **present circumstances**. The Transportation Cabinet shall not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of 49 CFR 26.

The Transportation Cabinet cannot refuse to certify a firm solely on the basis that it is a newly formed firm.

DBE firms and firms seeking DBE certification must cooperate fully with the Transportation Cabinet's requests (and U.S.D.O.T. requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial or removal of certification.

¹⁴ 49 CFR 26.73(a)(2).

¹⁵ 49 CFR 26.73(d).

¹⁶ 49 CFR 26.73(e).

VIII. CERTIFICATION PROCEDURES

Application Process

The Transportation Cabinet's DBE certification process is conducted in accordance with the Kentucky Unified Certification Program (UCP) Agreement¹⁷ as approved by FHWA. The UCP provides that the Transportation Cabinet is the primary certification authority for the U.S.D.O.T. DBE Program in Kentucky. A copy of the UCP Agreement is attached to the DBE Program Plan.

The Transportation Cabinet shall determine the eligibility of firms applying for DBE certification within 90 days receipt of a signed, notarized and completed UCP Certification Application¹⁸ and *Personal Net Worth Statement (PNW)*. All firms seeking DBE certification shall submit an application for certification or renewal to the Transportation Cabinet's OMA.

Each application form shall be completed in full. If the application is incomplete, the OMA will contact the applicant to request missing information or additional information. Incomplete applications will not be processed.

The Transportation Cabinet may request additional information in order to determine if an applicant firm should be certified. Failure of the applicant firm to provide the requested information shall be cause for the Transportation Cabinet to deny the application.

All documentation required by the application shall be attached to the completed application.

The person signing the application shall identify his or her position with the firm or business enterprise applying for certification.

On-site Inspection and Owner Interview

The Transportation Cabinet shall perform an on-site inspection of each new applicant located within the boundaries of Kentucky.

The Transportation Cabinet may perform an on-site inspection of any firm previously certified that is applying for renewal. The Transportation Cabinet may also perform periodic on-site inspections through its monitoring of certified DBE firms.

Failure of the applicant firm to participate in the on-site inspection shall be sufficient cause for the Transportation Cabinet to deny the application.

¹⁷ 49 CFR 26.81

¹⁸ The UCP Application is available through the OMA.

An out-of-state applicant must be certified as a DBE by the state transportation agency responsible for certifying firms under 49 CFR 26 in the state in which the firm has residence.

Resources Available to DBE Applicants

During the period prior to the formal submittal of the application, the Transportation Cabinet OMA shall:

- (a) When requested by the applicant, provide technical advice needed by the applicant in completing the application form and the supporting documentation;
- (b) When requested by the applicant, advise the applicant firm of any apparent existing structural, organizational, or financial impediments to the firm's certification; or

Evaluation of Application

The Transportation Cabinet shall use the eligibility standards set forth in 49 CFR Part 26 to determine the eligibility of a firm to be certified or renewed as a DBE.

Notice of Certification

An applicant for DBE certification shall be notified in writing of the DBE's determination of eligibility within three business days of the DBE Certification Committee meeting at which the determination is made.

Duration of Certification

In accordance with 26 CFR 26.83, once a DBE is certified, it shall remain certified for a period of three (3) years from the date of notice of certification and until its certification has been removed through the procedures found in 26 CFR 26.87.

Records of a certified DBE firm shall be retained by the Transportation Cabinet for a period of five (5) years from the date of notice of certification.

If, within seven (7) days of the change in ownership or control, the firm notifies the Transportation Cabinet of the change, the Transportation Cabinet may extend the renewal date of the DBE firm for a brief period of time and with reasonable conditions placed on the firm. The Transportation Cabinet may then review the firm's eligibility status based upon a review of the firm's current circumstances.

Renewal

At least sixty (60) days prior to its renewal date, a certified DBE that intends to continue its certification shall submit an affidavit to the Transportation Cabinet that shall attest to the following:

- That there have been no changes made in the organization, structure, ownership and control of the firm since the last application was filed; and
- That the application form and attachments would be identical to the last one filed.

The affidavit shall be submitted to the Transportation Cabinet on the No Change Affidavit¹⁹, and include gross receipts for the most recent three (3) years. If the affidavit is not received by the renewal date, the Transportation Cabinet shall initiate the process to remove the DBE's eligibility. Removal proceedings shall be initiated upon written notice to the DBE.

Beginning with the application for renewal for the third year of certification, certified DBE firms prequalified to engage in highway construction, design or right-of-way activities, shall also submit evidence of participation in at least one (1) management development course.

Until notified otherwise by the Transportation Cabinet, a certification for which a renewal application has been timely filed shall continue in force as though the renewal had been approved.

Certified DBE firms must submit the following affidavit on the annual anniversary of their DBE certification:

I swear (or affirm) that there have been no changes in the circumstances of [name of firm] affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR 26. There have been no material changes in the information provided with [name of DBE's] application for certification, except for any changes about which you have provided written notice to the Transportation Cabinet under section 26.83(i). [Name of firm] meets Small Business Administration (SBA) criteria for being a small business concern and its average annual gross receipts (as defined by SBA rules) over the firm's previous three fiscal years do not exceed the amount allowed by law.

Certified DBE firms are required to submit to the Transportation Cabinet documentation of its size and three year gross receipts annually.

¹⁹ The No Change Affidavit can be obtained through the OMA.

The Transportation Cabinet has informed all currently certified DBE firms of the revised requirements of 49 CFR 26 in writing by letter, newsletter, through its website and in meetings held throughout the state. Transportation Cabinet personnel shall review each affidavit of "no change" and make a recommendation to the DBE Certification Committee regarding the firm's eligibility to continue participating in the DBE Program.

Denials of Eligibility

If an application for certification as a DBE is denied by the Transportation Cabinet the notification shall set forth the reasons for denial. A denial may be appealed to the Transportation Cabinet in accordance with KRS 13B within thirty (30) days of the receipt of the notice.

An applicant firm shall not reapply for certification for one (1) year from the effective date of denial.

The effective date of denial shall be one (1) of the following dates:

- (a) If the denial is not appealed, the date the notice is received or delivery is attempted;
- (b) If the denial is appealed and the denial is upheld, the date of the notice of final action on behalf of the Transportation Cabinet; or
- (c) If the denial is appealed and the appellant withdraws, cancels or otherwise suspends the appeal, the date of the withdrawal, cancellation or suspension of the appeal.

Decertification

The Transportation Cabinet may perform periodic reviews or on-site inspections of a certified DBE firm during its certification period to verify the continued eligibility of the firm. If the Transportation Cabinet finds noncompliance with the eligibility criteria or the certified firm fails to provide reasonable information requested, the Transportation Cabinet shall initiate proceedings consistent with 26 CFR 26.87 to decertify the firm.

The effective date of decertification shall be thirty (30) days after the date the notice of decertification is mailed to the firm provided the firm does not appeal the decertification to the Transportation Cabinet.

If a firm appeals decertification, the effective date shall be the date of the final ruling of the Secretary of the Transportation Cabinet. Decertification shall be for a specific period of time but not less than one (1) year.

Decisions of the DBE Certification Committee may be appealed under the provisions of KRS 13B. Administrative determinations made in accordance with the procedures set forth in KRS 13B may be appealed to the U.S.D.O.T.

During the pendency of an appeal of a decision to remove a firm's eligibility, the firm may continue to work as a DBE until all appeals are exhausted.

Challenges to DBE Eligibility

A third party may challenge the socially and economically disadvantaged status of an applicant for DBE status or of a certified DBE. The challenge shall be made in writing to the Transportation Cabinet.

With its letter, the challenging third party shall include all information available to it, which is relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged.

The Transportation Cabinet shall determine, on the basis of the information provided by the challenging party, and through its own review of the applicant or DBE's eligibility, if there is reason to believe that the challenged party is in fact not socially and economically disadvantaged.

The Transportation Cabinet shall notify the challenging party in writing of its determination concerning the eligibility of the challenged party. This shall terminate the proceeding.

If the Transportation Cabinet determines that there is reason to believe that the challenged party is not socially and economically disadvantaged, the OMA shall notify the challenged party that his or her status as a socially and economically disadvantaged individual has been challenged.

The notice shall:

- (a) Identify the challenging party;
- (b) Summarize the grounds for the challenge; and
- (c) Require the challenged party to provide the Transportation Cabinet, within a specific reasonable time period, information sufficient to evaluate his or her status as a socially and economically disadvantaged individual.

Failure to provide the requested information within the time limit shall be cause for the DBE to be decertified or denied certification.

If the socially and economically disadvantaged status of a new applicant is challenged, the challenge proceedings shall be completed prior to completion of the certification.

The Transportation Cabinet shall evaluate the information available and make a proposed determination of the social and economic disadvantaged of the challenged party. The Transportation Cabinet shall notify both parties of this proposed determination, setting forth the basis for its determination.

During the pendency of a challenge, the presumption that the challenged party is a social and economical disadvantaged individual shall remain in effect.

The decision of the Transportation Cabinet may be appealed to the U.S.D.O.T. by the adversely affected party to the proceeding under the procedures of 49 CFR 26.89.

Appeals and Hearings

Any party adversely affected by a decision of the Transportation Cabinet may appeal that decision within thirty (30) days of the notice of determination. The appeal shall be filed in writing with the Transportation Cabinet. The Transportation Cabinet shall schedule the date for the hearing on the appeal as soon as reasonably possible.

If an appeal hearing is rescheduled beyond the thirty (30) days from the date of the notification to deny certification at the request of the applicant firm and the firm is not currently certified, the firm's annual certification has expired, or the firm's request for renewal has been denied, the Transportation Cabinet shall not approve as part of an established DBE goal any of the work contracted by the applicant. The Transportation Cabinet shall conduct the administrative hearing pursuant to KRS Chapter 13B.

The hearing examiner's recommended findings of fact shall be sent to the Secretary of the Transportation Cabinet and shall be based on conditions existing at the time of the on-site inspection and owner interview conducted by the Transportation Cabinet. Changes made in the applicant's firm since the on-site inspection and owner interview shall not be considered by the Transportation Cabinet or a hearing examiner in determining the eligibility of the firm. An appeal from the Transportation Cabinet's final decision may be made to the U.S.D.O.T. in accordance with 49 CFR 26.89.

All certification denial notices (Notice of Final Action) issued by the Transportation Cabinet shall contain a statement advising the applicant of his or her right to appeal the determination to the Transportation Cabinet and to the U.S.D.O.T., pursuant to 49 CFR 26.89.

Appeals made to the Transportation Cabinet shall be made within thirty (30) days of the adverse determination and shall be sent to the following address:

Kentucky Transportation Cabinet
Office of Minority Affairs
200 Mero Street, Sixth Floor 6-6
Frankfort, KY 40622

Appeals made to U.S.D.O.T. shall be filed within ninety (90) days receipt of the adverse determination and must be sent to the following address:

Department of Transportation
Office of Civil Rights
Room 2401, 400 7th Street, S. W.
Washington, DC 20590

The Transportation Cabinet shall provide to the U.S.D.O.T. a complete record of all administrative proceedings held on the matter, including all supporting and requested documents, files and application form within twenty (20) days receipt of a notification by the U.S.D.O.T. that an appeal has been filed with U.S.D.O.T. in the matter.

The Transportation Cabinet shall promptly implement any U.S.D.O.T. certification appeal decisions affecting the eligibility of a firm adversely affected the Transportation Cabinet's decision to deny it DBE certification.

IX. DBE CERTIFICATION COMMITTEE

The certification entity for the Kentucky Transportation Cabinet is the DBE Certification Committee. The DBE Certification Committee operated in accordance with the UCP Agreement. The DBE Certification Committee shall make certification eligibility determinations consistent with 49 CFR 26.

The DBE Certification Committee is comprised of the following members:

- (a) Executive Director, Office of Minority Affairs or his or her designee, Chair, nonvoting member;
- (b) Director, Division of Construction or his or her designee;
- (c) Director, Division of Highway Design or his or her designee;
- (d) Audit Manager, Internal/External Audit Branch or his or her designee;
- (e) Director, Division of Contract Procurement or his or her designee;
- (f) Director, Division of Professional Services or his or her designee;
- (g) Executive Director, Office of Legal Services or his or her designee, nonvoting member;
- (h) Division Administrator of the Federal Highway Administration or his or her designee, ex officio, nonvoting member;

The Chair of the DBE Certification Committee shall schedule meetings as needed.

Consistent with the decision of the DBE Certification Committee, the Transportation Cabinet shall issue a written determination of eligibility for certification within ninety (90) days of receipt of a completed original application provided that a challenge to the firm's certification has not been received.

X. Contract Administration

Recipient/Contractor Assurances

Each Federal-aid construction or design contract approved by the Transportation Cabinet shall include the following assurance: The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR 26 in the award and administration of U.S.D.O.T.-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

Contract Award Process

The Transportation Cabinet reviews each federally-funded highway contract to determine if it is appropriate to set a DBE goal on the contract. If a DBE goal is set on a highway contract the project goal will be provided in the *Notice to Contractors* issued at least 21 days prior to the project letting and in the project proposal.

Contractors shall exercise all necessary and reasonable efforts to ensure that DBEs participate in at least the percent of the total dollar amount of the project goal designated on the contract. For example, if the project cost is \$10 million and carries a six percent (6%) goal, \$600,000 of the contract shall be allocated to certified DBEs, or the contractor must show that all reasonable efforts were exerted to meet the goal. (See Good Faith Efforts.)

1. Certification of Contract Goal

Contractors shall certify their anticipated DBE participation in their bids on projects for which a DBE goal has been established.

BIDS SUBMITTED WHICH DO NOT INCLUDE CERTIFICATION OF DBE PARTICIPATION WILL NOT BE READ PUBLICLY. These bids will not be considered for award by the Transportation Cabinet and will be returned to the bidder.

"The bidder certifies that it has secured participation by Disadvantaged Business Enterprises ("DBE") in the amount of _____ percent of the total value of this contract, and that the DBE participation is in compliance with the requirements of 49 CFR Part 26 and the policies of the Kentucky Transportation Cabinet pertaining to the DBE Program."

2. Tips for Contractors

The Transportation Cabinet has and will continue to reject entire bid packages for failure to comply with this policy.

- If there is a goal on the project, bidders may not leave the certification blank. Bids that do not include a percentage in the certification will be rejected as non-responsive.
- Bidders may designate zero "0" in the certification and still have their bids considered for award. However, bidders who certify "0" as their goal must prove through the Good Faith Efforts process that they have made reasonable efforts to meet the DBE project goal.
- Any bid that includes a DBE participation percentage of less than the project goal set by the Transportation Cabinet will be required to submit a "Good Faith Efforts" package for review by the Transportation Cabinet's Good Faith Efforts Committee.

3. After the Letting

After the letting, the Transportation Cabinet will review each proposal containing a DBE goal and determine if a General DBE Participation Plan has been submitted. Plans submitted with low bids will be reviewed to assure that the DBEs listed are DBE certified and that they hold certificates of eligibility to perform the work that is to be contracted to them. Discrepancies in these areas may cause the bid to be rejected, and the second responsive bid will then be reviewed for compliance.

The Transportation Cabinet schedules project lettings as needed. Following the letting, the low bid on each project is submitted to the Awards Committee at the earliest possible date to be considered for award. If the low bidder has met the DBE goal and has included its General DBE Participation Plan in its bid package, then the Awards Committee may consider the bid as soon as the Division of Contract Procurement can approve the General DBE Participation Plan.

The low bidder who does not submit a General DBE Participation Plan with the bid must submit it within ten (10) calendar days' receipt of notification that it is the low bidder. The project will not be considered for award prior to submission and approval of the low bidder's General DBE Participation Plan.

If the Transportation Cabinet determines that the low bidder has not complied with the DBE Program goal and policies, the Transportation Cabinet may award the project to the next lowest responsive bidder, or re-bid it.

Proving Good Faith Efforts

Once a DBE goal is established on a contract, the Transportation Cabinet may only award the contract to a prime contractor who has made a good faith effort to meet the DBE goal. The contract shall not be awarded unless the low bidder can show prior to the award that it has either met the contract goal, or it expended sufficient good faith efforts to meet the goal and despite those efforts, failed. The Transportation Cabinet shall not withhold an award of a contract if the low bidder has made a good faith effort to meet a project goal, but has failed despite those efforts.

1. Defining Good Faith²⁰

“Good faith” is obtained if²¹:

- The prime contractor provides documents to show that the goal is met; or
- The prime contractor documents that it made adequate good faith efforts to meet the goal, even though it did not succeed.

If a bidder fails to meet the goal established on a contract, then it may still be awarded the contract if it can be shown that it made all necessary and reasonable steps to secure the required DBE participation. The bidder must provide the Transportation Cabinet with sufficient documentation to meet this test. The bidder must provide the Good Faith Efforts Committee with a Good Faith Efforts Package. The Good Faith Efforts Package shall include, but need not be limited to information showing evidence of the following²²:

- Whether the bidder attended any pre-bid meetings that were scheduled by the Transportation Cabinet to inform DBEs of subcontracting opportunities;
- Whether the bidder provided solicitations through reasonable and available means;
- Whether the bidder provided written notice to all DBEs listed in the DBE directory who are prequalified in the areas of work that the bidder will be contracting;
- Whether the bidder followed up initial solicitations of interest by contacting DBEs to determine with certainty whether they were interested. If a reasonable amount of DBEs within the targeted

²⁰ 49 CFR 26.53.

²¹ 49 CFR 26.53(a).

²² Further guidance may be found in 49 CFR Part 26, Appendix A.

districts do not provide an intent to quote or no DBEs are prequalified in the subcontracted areas, the bidder must notify the DBELO in the OMA to give notification of the bidder's inability to get DBE quotes;

- Whether the bidder selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the contract goals. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise perform these work items with its own forces;
- Whether the bidder provided interested DBEs with adequate and timely information about the plans, specifications, and requirements of the contract;
- Whether the bidder negotiated in good faith with interested DBEs not rejecting them as unqualified without sound reasons based on a thorough investigation of their capabilities. Any rejection should be so noted in writing with a description as to why an agreement could not be reached;
- Whether quotes were received from interested DBEs but were rejected as unacceptable without sound reasons why the quotations were considered unacceptable. The fact that the DBEs' quote for the work is not the lowest quote received will not in itself be considered as a sound reason for rejecting the quote as unacceptable. The fact that the bidder has the ability and/or desire to perform the contract work with its own forces will not be considered a sound reason for rejecting a DBE quote. Nothing in this provision shall be construed to require the bidder to accept unreasonable quotes in order to satisfy DBE goals;
- Whether the bidder specifically negotiated with subcontractors to assume part of the responsibility to meet the contract DBE goal when the work to be subcontracted includes potential DBE participation;
- Whether the bidder made any efforts and/or offered assistance to interested DBEs in obtaining the necessary equipment, supplies, materials, insurance and/or bonding to satisfy the work requirements of the bid proposal; and

- Any other evidence that the bidder submits which may show that the bidder has made reasonable good faith efforts to include DBE participation.

2. Good Faith Efforts Packages

If the DBE participation submitted in the bid by the lowest responsive bidder does not meet or exceed the DBE contract goal, the lowest responsive bidder must submit a Good Faith Efforts Package to satisfy the Transportation Cabinet that sufficient good faith efforts were made to meet the contract goals prior to submission of the bid.

Efforts to increase the goal after bid submission will not be considered in justifying the good faith effort, unless the prime contractor/consultant can show that the proposed DBE was solicited prior to the letting date. DBEs utilized in achieving the DBE goal must be certified and prequalified at the time the bid is submitted.

One complete set and nine (9) copies of this information must be received in the Division of Contract Procurement no later than 12:00 noon of the tenth calendar day following opening of bids.

Where the information submitted includes repetitious solicitation letters it will be acceptable to submit a sample representative letter along with a distribution list of the firms solicited. Documentation of DBE quotations shall be a part of the good faith effort submittal as necessary to demonstrate compliance with the factors listed below which the Transportation Cabinet considers in judging good faith efforts. This documentation may include written subcontractors' quote, telephone log notations of verbal quote, or other types of quote documentation.

The Good Faith Efforts Package shall include, but may not be limited to information showing evidence of its efforts to meet the goal.

3. Failure to Meet Good Faith Requirement

Where the low bidder fails to submit sufficient DBE participation to meet the contract goal and the Good Faith Efforts Committee determines that the low bidder failed to make sufficient efforts to meet the contract goal, the bidder will be notified that it has not made a Good Faith Effort. The bidder will be offered the opportunity to meet in person for administrative reconsideration.

The Good Faith Efforts Committee shall make its determination based upon the record as a whole.

The bidder will be notified of the Good Faith Efforts Committee's decision within 24 hours of its decision. The notification will be confirmed in writing. The bidder will have 24 hours to request reconsideration of the Good Faith Efforts Committee's decision. The reconsideration meeting will be held within two working days of the receipt of a request by the bidder for reconsideration.

The Secretary of the Transportation Cabinet or his designee will hear the request for reconsideration. The bidder will have the opportunity to present written documentation or argument concerning the issue of whether it met the goal or made an adequate good faith effort. The bidder will receive a written decision on the reconsideration explaining the basis for the finding that the bidder did or did not meet the goal or made adequate good faith efforts to do so.

The result of the reconsideration process is not administratively appealable to the Transportation Cabinet or to the U.S.D.O.T.

The Transportation Cabinet reserves the right to award the contract to the next lowest responsive bidder or to rebid the contract in the event that the contract is not awarded to the low bidder as the result of a failure to meet the good faith requirement.

4. Good Faith Efforts After the Contract Award

In instances where a DBE subcontractor cannot or will not perform work as contracted, the prime contractor may be required to replace the DBE subcontractor on the job, or prove good faith efforts to do so.

Good Faith Efforts Committee

The Division of Contract Procurement has primary responsibility for the review of all submittals of requests for determinations of Good Faith Efforts by contractors seeking to act as prime contractors on Transportation Cabinet projects that receive federal highway funds. The recommendations of the Division of Contract Procurement concerning good faith efforts are submitted to the Good Faith Efforts Committee for consideration and final approval.

1. Good Faith Efforts Committee Membership

The following entities shall be represented on the Committee:

Chair:
Office of the State Highway Engineer

Members:

Office of Minority Affairs
Division of Construction
Division of Contract Procurement
Internal/External Audits Branch

Secretary:

Division of Contract Procurement

Advisor:

Office of Legal Services

Resource:

DBE Liaison Officer

Ex Officio Invitees:

Federal Highway Administration
Kentucky Association Highway Contractors
Kentucky Association of Disadvantaged Business Enterprises

2. Rules of Operation

Committee members must attend all meetings of the Good Faith Efforts Committee or be represented by a proxy. The proxy shall be named in advance and designated by the director of the subject entity in writing and shall attend Committee meetings on all occasions when the member is unavailable. The intent of this provision is that the Good Faith Efforts Committee be comprised of persons familiar with the purpose, goals and operations of the DBE Program.

All members must receive notice of the meeting not less than five working days prior to the meetings. When possible, the notice will include all Good Faith Efforts Packages submitted to the Transportation Cabinet by prospective bidders.

In the event that the State Highway Engineer cannot attend, then the Deputy State Highway Engineer for Construction and Operations or his proxy will attend and act as Chair.

The Good Faith Efforts Committee meetings are held on the Monday after the Good Faith Efforts Packages are due to the Transportation Cabinet. If the Monday is a holiday, the Committee meeting will be held on the Tuesday following the date that the Good Faith Efforts Packages are due or on a date designated by the State Highway Engineer

3. Good Faith Efforts Committee Procedures

The Good Faith Efforts Committee meeting is for the purpose of allowing the members to analyze the Good Faith Efforts Packages and to ask questions of the Division of Contract Procurement staff concerning the bidder's effort. The Chair will then call for a vote and only designated members may vote to make the determination of good faith.

A representative of the Division of Contract Procurement acts as secretary to the Good Faith Efforts Committee. Official minutes are recorded. The minutes must be typed, approved and signed by the representative as secretary and by the State Highway Engineer as Chair. Votes are recorded. The validity of the good faith effort will be determined by a simple majority vote after the Committee members have had an opportunity to review and consider the Good Faith Efforts Package as a whole. In the event of a tie, the Chair shall then cast the tie-breaking vote.

If the vote of the Committee is not unanimous, individual votes shall be recorded. The original minutes are retained in the Good Faith Efforts Committee's files in the Division of Contract Procurement. Each Committee member receives a copy of the minutes.

The contractor requesting approval of good faith efforts may attend the Good Faith Efforts Committee meeting.

In the event that the Committee determines by a preponderance of the evidence that the lowest responsive bidder has failed to meet the Good Faith Effort criteria, then that bidder will be rejected and the Good Faith Efforts Package of the next lowest responsive bidder may be requested (if that bidder did not meet the goal) and reviewed in the same manner, or the Transportation Cabinet, at its discretion, may elect to rebid the project.

4. Good Faith Efforts Packages

Requirements for the contents of Good Faith Efforts Packages is contained in the Special Note included in the requests for proposals issued to prospective bidders on all highway construction projects receiving federal funds.

All Good Faith Efforts Packages shall be submitted to the Transportation Cabinet within 10 days of the receipt of notice that the contractor is the low bidder.

The Good Faith Efforts Packages will be evaluated for completeness by the Division of Contract Procurement in accordance with 49 CFR 26 and this DBE Program Plan. Good Faith Efforts Packages shall be presented to the Good Faith Efforts Committee members when they have been

determined to be complete. The Division of Contract Procurement may request more information from the bidder prior to the presentation of the Good Faith Efforts Package to the Good Faith Efforts Committee.

5. Administrative Reconsideration

Where the lowest responsive bidder fails to submit sufficient participation by DBE firms to meet the contract goal and upon determination by the Good Faith Efforts Committee based upon the information submitted that the lowest responsive bidder failed to make sufficient reasonable efforts to meet the contract goal, the bidder will be offered an opportunity to meet in person for administrative reconsideration. The reconsideration meeting will be held within two business days of the receipt of a request by the bidder for reconsideration or on the first date on which the Good Faith Efforts Committee may meet.

The Office of the Secretary of the Transportation Cabinet will hear the request for reconsideration. The bidder will have the opportunity to present written documentation or argument concerning the issue of whether it met the goal or made an adequate good faith effort. The bidder will receive a written decision on the reconsideration explaining the basis for the finding that the bidder did or did not meet the goal or made adequate good faith efforts to do so.

The result of the reconsideration process is not administratively appealable to the Transportation Cabinet.

Prompt Payment and Retainage

Prime contractors for the Transportation Cabinet shall be required to pay all subcontractors and material suppliers and other service providers, including non DBE firms within seven (7) working days after it has received payment from the Transportation Cabinet for work performed, materials furnished or services provided on Federal-aid highway construction and design projects.

Over-concentration²³

The Transportation Cabinet shall review its DBE participation annually with respect to the areas of work in which DBE firms receive subcontracts. When there is an indication that DBE firms are performing work on U.S.D.O.T.-assisted contracts to an extent to which non program-eligible firms are being excluded from that type of work, the Transportation Cabinet, following an investigation, shall take appropriate corrective action.

²³ 49 CFR 26.33

The Transportation Cabinet shall devise measures to address over-concentration once it has been clearly documented. Measures available to address over-concentration may include the use of incentives, technical assistance, business development programs, mentor-protege programs and other appropriate measures designed to assist DBE firms to perform work in areas outside the area(s) of over-concentration. When areas of over-concentration have been documented to exist, the Transportation Cabinet shall take appropriate measures to address the over-concentration in conjunction with U.S.D.O.T. The Transportation Cabinet shall notify prospective bidders on the project of any exception in the bid proposal.

Second-Tier Subcontracts

Second-tier subcontracts between a subcontractor and a DBE firm may be approved by the Transportation Cabinet prior to the beginning of work on the second-tier subcontract. Second-tier subcontracts may be credited to the DBE goal established for a U.S.D.O.T.-assisted contract.

DBE Workforce and Supervision

At least 50 percent of the work outlined in the subcontract shall be performed by the DBE subcontractor's work force.

A DBE subcontractor shall designate in writing a project superintendent who supervises the subcontractor's work force daily. The project superintendent shall not be employed by any other contractor on the same project for the life of the project.

If the subcontractor rents equipment from another contractor, the rental agreement shall be in writing and approved by the Transportation Cabinet's resident engineer on the project.

If a DBE is the prime contractor on a project which has participation goals established for the project, the work performed by the DBE shall count toward the participation goal.

If any certified DBE is found to be in noncompliance with any of the requirements of the administrative regulations governing the DBE Program, the firm may have its certification suspended for a specific period of time. The OMA shall notify the certified DBE of the pending suspension. The notice shall specify the reasons for the pending suspension.

All suspensions are subject to review pursuant to KRS 13B.

XI. COUNTING DBE PARTICIPATION

The Transportation Cabinet shall count DBE participation toward its overall and contract goals as provided in 49 CFR 26.55.

Value of Work Performed by the DBE

When a DBE participates in a contract, the Transportation Cabinet shall count only the value of the work actually performed by the DBE toward DBE goals.

Termination and Replacement of DBEs

No prime contractor on a U.S.D.O.T.-assisted contract shall terminate for convenience a DBE subcontractor approved to meet a DBE contract goal (or an approved DBE substitute firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the prior written consent of the Transportation Cabinet.

When a DBE subcontractor is terminated or fails to complete its work on a contract for any reason, the Transportation Cabinet shall require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBEs to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established for the procurement.

Certified DBE firms approved to meet Federal-aid contract goals may be replaced on a project only with the prior approval of the Transportation Cabinet.

Suppliers, Manufacturers and Brokers

The prime contractor may count expenditures for materials and supplies obtained from certified DBE suppliers and manufacturers on which the DBE assumes actual and contractual responsibility for providing the provided materials and supplies as follows:

The prime contractor may count its entire expenditure to a DBE manufacturer who operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the contractor;

If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals, and

Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning under the 49 CFR 26.

The prime contractor may count toward its DBE goal the following expenditures to certified DBEs that are not manufacturers or regular dealers:

- The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services;
- The fees charged for delivery of materials and supplies required on a job site (but not the cost of materials and supplies themselves) when the hauler, trucker or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services; and
- The fees commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar service.

Toward the DBE participation goal established for the project, the prime contractor may count only expenditures to certified DBEs that perform a "commercially useful function" in the work of the specific contract.

Trucking Firms²⁴

The Transportation Cabinet will count for DBE credit the dollar volume attributable to no more than twice the number of trucks on a contract owned by a DBE firm, or leased from another DBE firm.

For example, if DBE Firm X owned two trucks, leased two others from another DBE firm and leased six others from a non-DBE firm, the DBE credit authorized for Firm X's participation would be equivalent to the dollar volume of work attributable to eight trucks (four trucks owned or leased from DBEs, multiplied by two). DBE credit for the remaining two non-DBE trucks leased for the contract would be limited to fees and commissions received by the DBE firm pertaining to those two trucks.

²⁴ 68 Fed. Reg. 3551 (June 16, 2003) and 49 CFR 26.55(d)(5).

The Transportation Cabinet shall use the following factors in determining whether a DBE trucking firm is performing a "commercially useful function":

- The DBE firm must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
- The DBE firm must itself own and operate at least one fully licensed, insured and operational truck used on the contract.
- The DBE firm receives credit for the total value of the transportation services it provides on a contract using trucks it owns, insures and operates using drivers it employs.
- The DBE firm may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE firm that lease trucks from another DBE firm receives credit for the total value of the transportation service the lessee DBE firm provides on the contract.
- The DBE firm may also lease trucks from non-DBE firms, including owner-operator. The DBE firm that leases trucks from a non-DBE firm is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE firm does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE firm.
- To be approved by the Transportation Cabinet, a lease must indicate the DBE firm has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the terms of the lease with the consent of the DBE firm, so long as the lease gives the DBE firm absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE firm.

XII. CONTRACT PERFORMANCE MONITORING

The OMA shall have primary responsibility for monitoring active Federal-aid contracts and enforcing the provisions of the DBE Program.

Monitoring of the Execution of Work by DBEs

Construction field personnel are key to the success of the Transportation Cabinet's DBE Program. Federal law requires that the work of DBE contractors be monitored in the field as part of the effort to assure that DBEs are actually performing the work.²⁵

Resident engineers and inspectors are assigned the responsibility for monitoring the work of DBEs on a project-by-project basis. When monitoring DBEs resident engineers shall:

- Know whether a project has a DBE goal and the amount of the goal;
- Know the names of any DBE contractors or suppliers who have contracts to work on the project;
- Know what work the DBE has been subcontracted to do;
- Keep apprised of the schedule for DBE work and notify the OMA when the DBE is scheduled to be on the job;
- Monitor and document work performed by the DBE and note whether the work is being performed by employees of the DBE firm or by the prime contractor or another non-DBE firm;
- Ensure that certified payrolls are promptly provided by DBE firms;
- Confirm that DBE subcontractors are in compliance with 49 CFR 26 concerning ownership and leasing of equipment; and
- Notify immediately the DBELO of any irregularities or issues that arise with regard to a DBE work item.

Daily inspection reports shall reflect the activities of the DBE firm, including the number and classification of personnel working on the job.

²⁵ 49 CFR 26.37(b).

The Transportation Cabinet may monitor the work of any DBE. Other agencies, including civil rights authorities, the Federal Highway Administration, the Division of Contract Procurement, the Office of Legal Services, and the Office of the Inspector General (OIG) of the Transportation Cabinet may monitor the work of DBEs and contractors as necessary.

Monitoring by other divisions or agencies does not alleviate the need or lessen the responsibility for resident engineers and inspectors to monitor the work of DBEs.

Tracking of Payments made to DBEs

The Division of Construction is primarily responsible for seeing that payments are made to prime contractors for work performed on highway construction and maintenance projects. As part of those duties, the Division of Construction is also responsible for the confirmation of payments made to DBE subcontractors.

The Transportation Cabinet requires that prime contractors pay DBE subcontractors for satisfactory performance within seven (7) working days of the receipt of payment from the Transportation Cabinet.²⁶

Problems with payment by prime contractors should be reported to the Division of Construction at 502/564-4780.

The federal regulations, 49 CFR 26, require that the Transportation Cabinet confirm that payments made to DBEs equal the awards and commitments reflected in contracts containing DBE goals. A running tally of contract commitments and payments to DBE subcontractors is maintained by the Transportation Cabinet to confirm the status of payments to each DBE.²⁷

Prime contractors must incorporate a requirement into DBE subcontracts, including supply contracts, requiring DBEs to provide the Division of Construction with a copy of all checks received from the prime contractor within seven (7) days of receipt of payment for work performed on Transportation Cabinet projects. Copies of checks to DBE subcontractors must include the PCN number, estimate number and the subsection sequence code and quantity for which the check was written.

DBE Suppliers and Brokers

The Transportation Cabinet allows the use of DBE suppliers for credit toward DBE goals provided they meets the criteria found at 49 CFR 26.55(e). DBE suppliers shall provide information confirming that they are a “regular dealer” and can perform a

²⁶ 49 CFR 26.29.

²⁷ 49 CFR 26.37.

“commercially useful function” as a supplier. “Commercially useful function” is considered in determining whether the contributions of suppliers and brokers may be counted toward the DBE goal.²⁸

Sixty percent of the cost of items supplied by a certified DBE supplier may be counted toward a DBE project goal.

1. Regular Dealer

In order to be considered a *regular dealer* in the specific materials supplied, the DBE must:

- Own, operate or maintain a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described in the contract specifications are bought, kept in stock, and are regularly sold or leased to the public in the usual course of business; and
- Be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the materials, supplies, articles or equipment in question.

2. Bulk Items

Bulk items such as petroleum, cement, gravel, stone or asphalt may be supplied by a DBE who both owns and operates distribution equipment for the products.

Approval of Items Supplied

The DBE must show that it is a *regular dealer* of each item to be supplied, and that it is capable of performing the work that it is seeking to be certified to do.

3. Commercially Useful Function

In order to have their work counted toward the DBE goal, suppliers must perform a “commercially useful function” on the project. To perform a “commercially useful function” in the transaction, the DBE must demonstrate that it will be responsible for the execution of the work of the contract and meet its responsibilities by actually performing, managing and supervising the work involved.

²⁸ 49 CFR 26.73(a).

The DBE supplier must demonstrate that it is responsible for the following:

- Negotiating price;
- Determining quality and quantity;
- Ordering material;
- Installation (if applicable);
- Paying for the material;
- Assuming the risk of loss for the materials until they are accepted by the prime contractor for use on the job. (Obtaining insurance for the risk of loss in transport is an indication of assumption of risk.), and
- The price paid for the work must be commensurate with the work performed to supply the materials.

4. Dos and Don'ts of DBE Suppliers

If you are a prime contractor seeking to use a DBE supplier to meet a DBE contract goal, or a potential supplier, ask yourself the following questions:

- Does the “firm” order, assume ownership and the risk of loss of supplied items during transit? If not, then the “firm” is really a broker and only the brokerage fee can be counted.
- Is the “firm” responsible for transporting the items either with their own equipment or through a long-term lease? If so, they are likely to be a supplier, if not, then the DBE is likely acting as a broker.

5. Leases by Suppliers

Suppliers who are *regular dealers* in the items they supply, but who do not own the equipment necessary to deliver the items, must have a lease agreement with provider of the transportation equipment in order for the transportation costs associated with supplying the item to be counted toward the DBE goal.²⁹

The following are requirements for the lease of transportation equipment by the DBE:

- The lease must be in effect prior to the date of the letting of the contract.
- A lease must indicate that the DBE has exclusive use of and control over the vehicle(s) leased. This requirement does not preclude the leased vehicle(s) from working for others during the term of the lease

²⁹ 49 CFR 26.55(e) and 64 Fed. Reg. 5096 (February 2, 1999).

with the consent of the DBE, so long as the lease gives the DBE priority for use of the leased vehicle(s).

- Leases must be for a definitive period. Leases cannot be on an ad hoc basis or for a single project. The purpose of this provision is to show a regular, ongoing relationship between the lessor and the DBE.
- The lease may include provisions for the lease of a driver/operator.
- The lease must address the price to be charged the DBE for use of the transportation and distribution equipment. This provision need not state the exact pricing, but may consist of a means of calculating the rate.
- Both parties must sign the lease.

6. Brokers³⁰

Brokers, repackagers, packagers and manufacturer's representatives, or other persons who arrange or expedite transactions are not *regular dealers* and their contributions shall not be counted as those of suppliers. Brokers may be utilized for DBE credit; however, only the dollar value of the commission paid to the broker can be applied toward the goal provided that the fees or commissions are reasonable for the work performed.

Examples:

If the prime contractor utilizes the services of a DBE to provide bridge beams to a \$30 million project, and pays a 1 percent (1%) commission on \$3 million worth of beams to the DBE to handle the paperwork, then the prime contractor may apply \$30,000 toward the DBE goal. In this scenario, the DBE does not have responsibility for the ordering or transportation of the beams, nor does it assume the risk of loss in transit.

On the other hand, if the DBE arranges transport with the manufacturer, takes ownership and assumes the risk of loss for the beams in transit, arranges the transportation with his own forces or through long-term lease, and supervises the delivery, then that DBE is a legitimate supplier and may count \$1.8 million (60 percent) toward the DBE goal.

³⁰ 49 CFR 26.55(e)(3).

Requirements for DBE Manufacturers

A firm may count one hundred percent (100%) of the dollar value of the cost of materials or supplies produced by a DBE manufacturer.³¹

A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described in the contract specifications.

The Transportation Cabinet shall, during the certification process, assess a DBE's ability to meet the requirements of a DBE manufacturer. The DBE manufacturer shall demonstrate that it has the facilities, means and expertise to manufacture any item that it presents itself to be a manufacturer. The DBE manufacturer shall also be required to provide proof that it operates the manufacturing facility independently.

A "manufacturer" who attempts to set up a precast concrete manufacturing facility on property owned and controlled by an established pre-cast manufacturer, will be required to show that it is not dependent upon the established company for its existence or success.

³¹ 49 CFR 26.55(e)(1)(ii).

Corrective Action

Areas of noncompliance within the DBE Program will be documented by the Transportation Cabinet and appropriate corrective action recommended when and where necessary. On documented cases of noncompliance, the OMA will notify the prime contractor of the details of the noted deficiencies and the action necessary to remedy or correct the deficiencies. Failure of the prime contractor to correct noted deficiencies may result in:

- (a) Withholding progress payments;
- (b) Sanction and/or reprimand;
- (c) Termination of contract; or
- (d) Other actions as appropriate.

XIII. RESPONSIBILITIES OF THE DIVISION OF CONTRACT PROCUREMENT

The Division of Contract Procurement is primarily responsible for the advertising, letting, award and administration of highway construction contracts. This responsibility also encompasses duties related to the administration of the contractual aspects of the DBE Program.

Prequalification of DBEs

All contractors and subcontractors, including DBEs, who propose to do work with the Kentucky Transportation Cabinet must obtain a Certificate of Eligibility to contract³² or obtain a waiver of the requirement from the Transportation Cabinet. The Certificate of Eligibility requirement is separate from and unrelated to the DBE certification. DBEs must be prequalified and certified prior to the letting of any contract on which they wish to participate for DBE credit. The process of obtaining a Certificate of Eligibility is conducted through the Division of Contract Procurement.

Compilation of the Notice to Contractors and Bid Proposal

The Division of Contract Procurement must issue a Notice to Contractors at least 21 days prior to the letting of any federal highway contract for bid. The notice includes the DBE project goal on federally-funded projects. The Division of Contract Procurement is responsible for the compilation of the bid proposal, which includes the Special Note applicable to the DBE goal.

Monitoring of the Bidding Process

An official from the Division of Contract Procurement monitors the bidding process. This official shall confirm that all bidders have certified their DBE participation in their bids for projects for which a DBE goal has been established.

Bids submitted which do not include certification of DBE participation will not be considered for award by the Transportation Cabinet and will be returned to the bidder.

Review and Approval of DBE Contracts and Subcontracts

The Division of Contract Procurement, in consultation with the Division of Construction, has the responsibility and authority to approve all subcontracts for firms on construction contracts, including DBEs.

³² Kentucky Revised Statutes 176.140. This process is also known as "prequalification".

With regard to contracts for consultant design, the Division of Professional Services has the responsibility and authority to approve all subcontracts, including DBE subcontracts with consultation with the user Division.

The OMA is available as a consultant to confirm DBE certification and DBE abilities.

Good Faith Efforts

The Division of Contract Procurement, with consultation from the OMA, has primary responsibility for the review of all submittals of requests for determinations of Good Faith Efforts by prime contractors on Transportation Cabinet projects. The Division of Contract Procurement makes a determination of completeness and reviews Good Faith Efforts Packages, then makes recommendations to the Good Faith Efforts Committee for consideration.

XIV. MANAGEMENT OF REPORTS OF POTENTIAL DBE PROGRAM VIOLATIONS

The Division of Construction, the Division of Contract Procurement and the OMA have responsibility for monitoring compliance with 49 CFR 26. Non-DBE and DBE contractors are equally responsible for compliance. All of these entities shall be responsible for reporting incidences of non-compliance with the regulations.

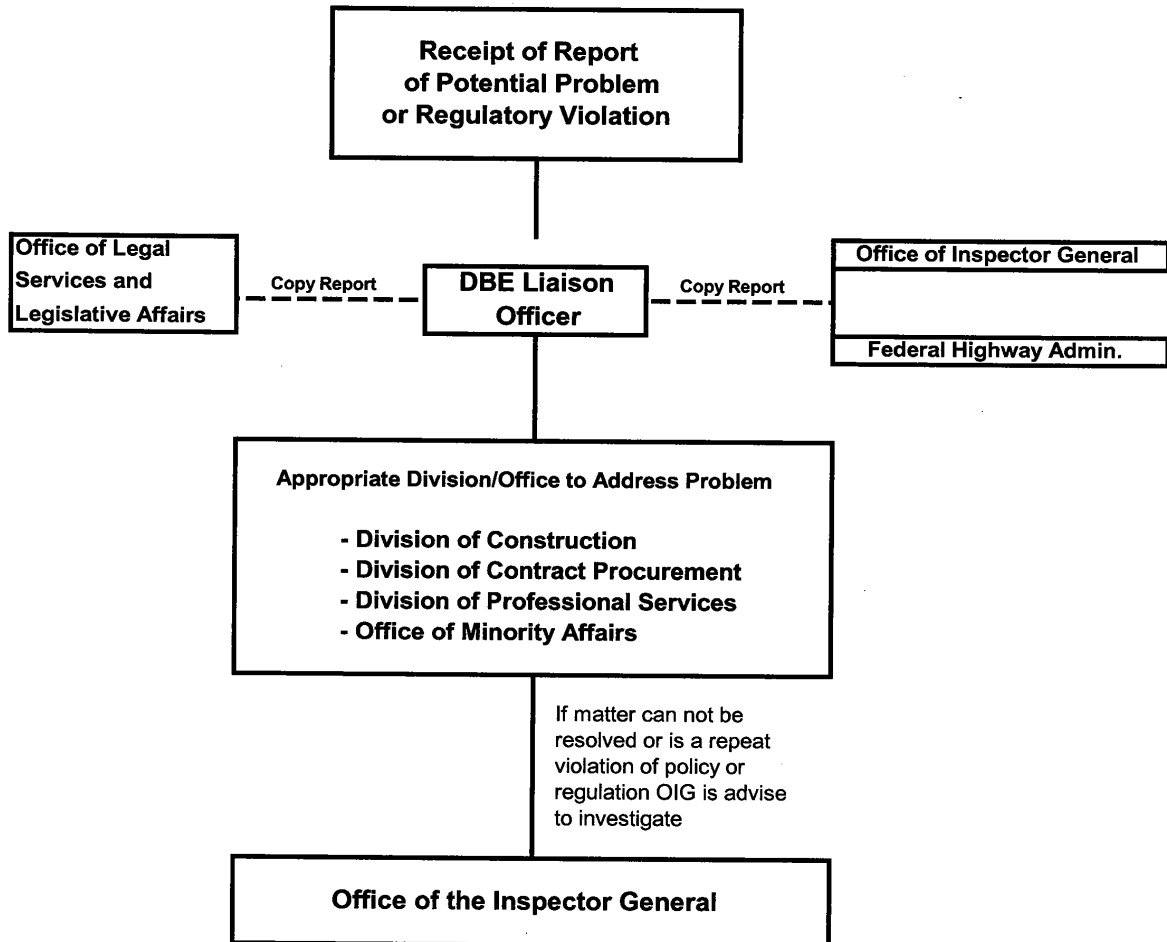
The recipient of a report of problems related to the conduct of DBEs, contractors or others regarding the DBE Program will forward the information to the DBELO. The DBELO shall work with the appropriate division of the Transportation Cabinet (Construction, Contract Procurement, and the OMA, etc.), the DBE and the prime contractor to address the related problem.

The DBELO shall copy all reports of regulatory violations related to the DBE Program to the OIG and the Office of Legal Services and the Division Office of the Federal Highway Administration.

If the problem cannot be resolved, or if the alleged violator has been involved in prior DBE Program violations, then the OIG and Office of Legal Services shall be notified immediately.

The OIG may determine at any time that a report of alleged wrongdoing warrants an investigation by the OIG. The OIG may issue a report of findings and make appropriate recommendations. Potential criminal violations will be referred to the appropriate authorities.

Management of Reports of DBE Program Violations



XV. ROLE OF THE OFFICE OF THE INSPECTOR GENERAL

Issues involving reports of wrongdoing and serious violations of the DBE Program will be referred to the Transportation Cabinet's OIG. If the OIG determines it appropriate, it may conduct an investigation of the reported incident. If the OIG determines that violations have occurred, then it may recommend that action be taken against contractors, DBEs or Transportation Cabinet personnel involved.

If the OIG determines that criminal activity may have occurred, then the matter shall be reported to the appropriate law enforcement agency for investigation.

XVI. RECORD KEEPING AND REPORTING

The Transportation Cabinet shall maintain such records and provide DBE Program data as directed by the U.S.D.O.T. and its operating administrations as required by 49 CFR Section 26.11 of the governing Federal regulations. This shall include monthly, quarterly, extraordinary and annual reports.

All contractors and subcontractors shall maintain such records as necessary to ensure DBE Program compliance and shall maintain such records for at least three (3) years following the completion of the contract. Such records shall be available for inspection by the Transportation Cabinet, U.S.D.O.T. and its administration representatives or federal law enforcement agencies, departments and officials upon request.

The Transportation Cabinet shall maintain strict confidentiality with regard to all personal financial information submitted by applicants for DBE Program certification. Personal financial information submitted to the Transportation Cabinet may be provided to a third party only with the written consent of the individual to whom the information pertains.

XVII. PUBLIC PARTICIPATION

The Transportation Cabinet continuously consults with minority, women and general contracting groups, fraternal, community and educational organizations and other organizations and officials who could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on the opportunities for DBE firms and the Transportation Cabinet's efforts to level the playing field with respect to the participation of DBE firms.

The Transportation Cabinet publishes a legal notice in the major print media (including minority-focused) within the Commonwealth announcing its proposed overall DBE Program goal and the methodology by which it was derived. The goal and its rationale are available for public inspection during normal working hours (8:00 a.m. to 4:30 p.m.) at the OMA for thirty (30) days following the date of the notice. The legal notice also informed interested parties that the Transportation Cabinet (and the Kentucky Division Office, Federal Highway Administration) would accept public comments for a period of 45 days from the date of the notice.

The Transportation Cabinet conducted regional public hearings on its DBE Program goal, and the changes to the DBE Program. The Transportation Cabinet will provide adequate public notice of all hearings through general circulation media and minority-focused media, as well as contractors organizations, DBE firms, highway contractors and other affected organizations, groups and individuals.

APPENDICES

- ▶ Department of Transportation - 49 CFR Parts 23 and 26 Federal Registers
<http://osdbuweb.dot.gov/business/dbe/dbe.pdf>
- ▶ 49 CFR 26 Department of Transportation - Final Rule
<http://osdbuweb.dot.gov/business/dbe/Docs/03-14989.pdf>
- ▶ Unified Certification Program (UCP) Agreement
- ▶ UCP Application
<http://osdbuweb.dot.gov/business/dbe/Docs/Final%20Application.DOC>
- ▶ Disadvantaged Business Enterprise Personal Net Worth Statement
http://www.kytc.state.ky.us/kytci-forms/TC_10_21/MPtc1021.html
- ▶ U. S. Small Business Administration Table of Small Business Size Standards Matched to Northern American Industry Classification System Codes
<http://www.sba.gov/size/sizetable2002.pdf>
- ▶ Good Faith Efforts Committee Operating Procedures
- ▶ Application for Certificate of Eligibility
- ▶ Notice to Contractors <http://transportation.ky.gov/Contract/>
- ▶ Rules and Regulations for Prequalification of Contractors
- ▶ Kentucky Revised Statutes – Relating to Qualification of Road Contractors and Material Suppliers
- ▶ Fact Sheet for Application for Certificate for Eligibility or Renewal
- ▶ DBE Special Note <http://transportation.ky.gov/Contract/DBE/>
- ▶ General DBE Participation Plan <http://transportation.ky.gov/Contract/DBE/>
- ▶ DBE Detailed Plan/Subcontract Request <http://transportation.ky.gov/Contract/DBE/>